In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1393

CHARLES CROCKARELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was deprived of his right to confront a witness who invoked his Fifth Amendment privilege in refusing to answer a single question on cross-examination, and that the trial court erred in failing to hold an evidentiary hearing regarding the unavailability of alleged "Jencks Act" material.

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted on four counts of an indictment charging him with the unlawful possession of distilling equipment in violation of 26 U.S.C. 5686(a), and with conspiracy to use his official position as sheriff of Stewart County, Tennessee, to establish and protect a distillery operation,

in violation of 18 U.S.C. 371.[1] He was sentenced to two years' imprisonment on the conspiracy count, four months to be served in jail and the remainder on probation. Sentence was suspended on the remaining counts. Petitioner was also fined $3,000 (Pet. App. A-5). The court of appeals affirmed (Pet. App. A-76).

In August, 1970, petitioner and a federal Alcohol, Tobacco, and Firearms agent conducted an unsuccessful search for an illegal distillery (Tr. 7-8). Petitioner subsequently discovered and seized the still, and the equipment was taken to petitioner's house and stored in his adjacent smokehouse (Tr. 45-48). Petitioner sold the distillery and "protection" to one Lim Manners for $1,400 (Tr. 65, 67, 70). The still was operated by Manners's sons, Melvin and Larry, until they were apprehended and charged with unlawfully fermenting mash (Tr. 88, 96).

1. Petitioner contends that he was denied his constitutional right to confront a witness against him because the prosecution called a witness who answered all questions on direct examination, but invoked his privilege against self-incrimination when asked a particular question on cross-examination. The witness, Melvin Manners, admitted knowing the name of the man from whom he bought sugar for use in operating the distillery, but refused to reveal the name on cross-examination, averring that by doing so, he would tend to incriminate himself (Tr. 148-149; Pet. App. A-26).

In *Namet* v. *United States*, 373 U.S. 179, 186-187, this Court recognized the interplay of two factors as

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[1] Petitioner's motion for acquittal was granted with respect to a count of the indictment charging him as an aider and abettor in the operation of the distillery (Tr. 410).

decisive of the defendant's rights when a government witness claims the privilege on direct examination: whether the government proceeded in good faith or instead was making an attempt to build its case out of invocation of the testimonial privilege, and second, whether an inference resulting from the exercise of the privilege added "critical weight" to the government's case. Under these tests, if the government presented only a weak case and called witnesses solely because they were expected to invoke the privilege, the conviction may be reversed. *United States* v. *King*, 461 F. 2d 53 (C.A. 8). But even where a witness is called in the full expectation that he will refuse to testify, there is no reversible error if the government does not rely on resulting inferences against the defendant to add "critical weight" to its case. *Cota* v. *Eyman*, 453 F. 2d 691 (C.A. 9), certiorari denied, 406 U.S. 949; *United States* v. *Brickey*, 426 F. 2d 680 (C.A. 8), certiorari denied, 400 U.S. 828.

In the instant case, neither of the *Namet* tests calls into question the admissibility of Melvin Manners's testimony. First, there is no showing of bad faith on the part of the prosecution, since the government had no reason to believe that Manners would refuse to answer questions posed either on direct or on cross-examination. The record shows that at petitioner's previous trial (which ended in a mistrial), Manners had denied knowing the name of the man from whom he bought his sugar (Tr. 105; Pet. App. A-13); at the second trial, he admitted knowing the name, but maintained that he had not learned the man's true name until shortly before the second trial (Tr. 146-148; Pet. App. A-25). The prosecution thus had no prior indication that such a question would elicit a refusal to answer.

Moreover, the government could not reasonably have anticipated that Manners would be permitted to claim his privilege, since he had already been convicted of offenses relating to his operation of the illegal distillery. The court, in fact, at one point ordered Manners to answer the question (Tr. 149; Pet. App. A-26). When Manners continued to assert his right to remain silent, the district judge then appointed an attorney who, after consulting with the witness, advised the court that in his view, the answer would tend to incriminate the witness in regard to an unrelated violation of law. Only then did the court rule that the witness need not answer the question (Tr. 155-159; Pet. App. A-31—A-34).

We note that the second test under *Namet* has not been met either, since petitioner shows no prejudice resulting from the witness' narrow exercise of his Fifth Amendment privilege. The one question he declined to answer bore no relation to petitioner's activities, and was merely tangential to the case.[2] The witness's refusal to answer created no inference unfavorable to petitioner. Petitioner's attorney conceded that the question was asked only in the anticipation that a truthful answer would reflect on the credibility of an unnamed prosecution witness (Tr. 111; Pet. App. A-18).

2. Petitioner also contends that the trial court should have conducted an evidentiary hearing to determine whether the government violated the Jencks Act, 18 U.S.C. 3500, by failing to turn over to the defense an original "statement" of a witness. The argument is without merit. The "statement" was a tape-recorded

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[2] The court indicated at one point that it was disposed to sustain the government's objection that the question was irrelevant (Tr. 108-109; Pet. App. A-15—A-16).

conversation between a government witness, Lim Manners, and one Clayton Spires, in which Manners allegedly told Spires of his purchase of the distillery from petitioner (Tr. 308; Pet. App. A-47). Prior to petitioner's trial, Spires contacted Treasury agents and advised them that he had taped such a conversation for his own purposes, but that he no longer needed the recording (Tr. 313; Pet. App. A-50). He gave the tape to the government agents, neither asking nor receiving anything in return (Tr. 353). The recording was subsequently played for a stenographer, who made shorthand notes from it (Tr. 354, 364). From these notes, a federal agent composed a "statement", which the stenographer typed (Tr. 358-359). The tape recording was then erased, and in accordance with her usual practice, the stenographer destroyed her shorthand notes (Tr. 354, 364). The prepared "statement", which concededly was not a verbatim transcription of the witness's own words, was supplied to the Assistant United States Attorney, who furnished a copy to petitioner's counsel (Tr. 299; Pet. App. A-40).

The foregoing facts were established in open court, in the absence of the jury, by the testimony of the federal agent, the stenographer, and Spires. Petitioner's attorney was also offered an opportunity to question Spires and the agent in the presence of the jury, but he declined to do so (Tr. 321, 345; Pet. App. A-56, A-73). Thus, the district court did conduct a thorough inquiry into the unavailability of the original tape recording, and had ample basis for ruling that the failure to produce the tape was not a violation of the Jencks Act.[3]

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[3] It seems, in any event, that the tape recording was not required to be produced pursuant to the Jencks Act, since the "statements" contained therein were made, not to a government agent, but to a private individual who made the recording for his own purposes.

It is therefore respectfully sumitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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